1604 (3)

No. 09-1132

SUPREME COURT, U.S.
FILED
JUN 29 2009
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

JOEL ESCOBAR OCHOA,

*Petitioner,*

v.

ERIC H. HOLDER, JR.,
Attorney General of the United States,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## REPLY BRIEF FOR PETITONER

ILYCE SHUGALL
*Counsel of Record*
MARC VAN DER HOUT
LAURA KENT-MONNING
VAN DER HOUT, BRIGAGLIANO & NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000
ishu@vblaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

# TABLE OF CONTENTS


| | Page |
|---|---|
| Table of Authorities | ii |
| Argument | 1 |
| Conclusion | 13 |

# TABLE OF AUTHORITIES

Page

CASES

*Doe v. Gonzalez*, 484 F.3d 445 (7th Cir. 2007) .....8, 9

*Fedorenko v. United States*, 449 U.S. 490 (1981).....6, 7, 8, 9

*Hernandez v. Rio*, 258 F.3d 806 (8th Cir. 2001).....8, 9

*INS v. Elias-Zacarias*, 502 U.S. 478 (1992).....2

*Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007).....10, 11, 12

*Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2005).....4, 5, 6, 7

*Olivera-Garcia v. INS*, 328 F.3d 1083 (9th Cir. 2003).....10

*Wisniewski v. United States*, 353 U.S. 901 (1957).....5, 6

*Zehatye v. Gonzalez*, 453 F.3d 1182 (9th Cir. 2006).....2

STATUTES

8 U.S.C. § 1252(b)(4)(B).....2

RULES

Sup. Ct. R. 10.....4

9th Cir. R. 32.1(a).....5

9th Cir. R. 36-3(a).....4

## ARGUMENT

The government fails to show why review in this case should be denied. Contrary to Respondent's arguments, the record in Petitioner's case lacks substantial evidence that Petitioner was ineligible for asylum because he had assisted in the persecution of others. Also contrary to Respondent's arguments, the Ninth Circuit's decision in this case is in conflict with its prior decisions and is also in conflict with opinions in other circuits. Further, and also contrary to the Respondent's arguments, the Ninth Circuit Court of Appeals erred in ruling on Petitioner's appeal because it did not have jurisdiction where neither the Immigration Judge nor the Board of Immigration Appeals issued a final order of removal. The Court should therefore grant review in this case.

1. In his opposition, Respondent argues that Petitioner's own testimony provided substantial evidence to support the finding of the Immigration Judge ("IJ") that "although [Petitioner] never directly participated in the torture of detainees, he did arrest people, knowing they might be tortured." Respondent's Brief in Opposition ("Opp.") 8 (citing Petition Appendix ("Pet. App.") 16).

Although Respondent accurately summarizes the IJ's finding, Respondent failed to address the essence of Petitioner's argument – that the panel erred when it held that substantial evidence supported this finding, as there is *no evidence in the record* that Petitioner arrested individuals *knowing* that they

may be tortured by other police officers, whereas there is evidence in the record that Petitioner spoke out against the torture he later learned of and ultimately resigned because of it. *See* Pet. 19-25.

There is no dispute that an IJ's factual findings are reviewed for substantial evidence. *See Zehatye v. Gonzalez*, 453 F.3d 1182, 1184-1185 (9th Cir. 2006). In reviewing the agency's factual findings under this standard, the appellate court must find that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B). Thus, the appellate court must "uphold the IJ's determination if it is supported by reasonable, substantial, and probative evidence in the record." *Zehatye*, 453 F.3d at 1185 (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992)). In the present case, the record lacks "reasonable, substantial, and probative evidence" that Petitioner arrested individuals knowing they would be tortured. However, in his brief in opposition to the petition, rather than analyzing the record that was before the IJ, Respondent simply quoted from the IJ's decision, which misstated the evidence Petitioner presented regarding his role in the persecution that occurred within the Guatemalan police force. Opp. 8.

In this case, the first time Petitioner was required to be on patrolling duty, when he was assigned to the Fourth District of police, he was wholly unaware that those who were arrested were

later tortured. Administrative Record ("A.R.") at 206-207. Rather, it was not until years later when he was assigned to work at the office taking reports of detainees who had been arrested and tortured, that he discovered that people who were arrested were later tortured. *Id.* Although Petitioner testified that, after learning about the torture practices of the Guatemalan police, he would "rarely" be sent to work at roadblocks and inspection points, he *never* testified that he personally made any arrests on these assignments. *See* A.R. at 212-213. In fact, the record shows that Petitioner, who for many years had no idea that the police force engaged in torture, complained to his superiors once he realized that individuals who were arrested by police were later tortured, and that Petitioner ultimately resigned because he disagreed with the practices of the police and believed them to be illegal. A.R. at 184-187, 206-207. Thus, Respondent is incorrect in asserting that Petitioner's own testimony provided substantial evidence to support the IJ's finding that Petitioner arrested people knowing they might be tortured.

2. Respondent further argues that, because the IJ did not base her conclusion that Petitioner assisted in the persecution of others on his role in typing statements from arrestees, this case does not present the question of whether Petitioner's taking statements of individuals after they were mistreated falls squarely outside a line established by Ninth Circuit precedent. Opp. 8. However, in finding that substantial evidence supported the IJ's determination that

Petitioner assisted in the persecution of others on account of their political opinion, the court of appeals included that Petitioner "recorded statements from detainees who had been tortured, and whose statements were given as a result of this torture." Pet. App. 4. Thus, such acts were considered in the decision below in reaching the conclusion that substantial evidence supported the IJ's decision. Moreover, contrary to Respondent's assertions, Petitioner is not arguing that the fact that he recorded statements from mistreated detainees was the only act he committed that led to the Ninth Circuit's conclusion that substantial evidence supported a finding that he assisted in the persecution of others. Rather, Petitioner argues that *both* his role as a patrolling officer *and* his primary role of recording statements of detainees fall squarely outside the "margin of culpability" established by Ninth Circuit precedent in *Miranda Alvarado v. Gonzales*, 449 F.3d 915 (9th Cir. 2005).

3. Respondent argues that this Court's review would not be warranted to resolve a conflict among Ninth Circuit decisions especially given that the Ninth Circuit decision at issue here is unpublished and thus non-precedential. Opp. 9 (citing to 9th Cir. R. 36-3(a)).

Respondent's assertion is without merit, as the considerations governing review on certiorari do not distinguish between published and unpublished decisions. Sup. Ct. R. 10. Further, and important to

note, the Ninth Circuit permits citation to unpublished opinions:

> A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been; (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and (ii) issued on or after January 1, 2007.

9th Cir. R. 32.1(a). In light of the above rule allowing citation to unpublished and non-precedential decision in the Ninth Circuit, it is highly important that even unpublished and non-precedential decisions be consistent with other decisions of the circuit, as all decisions issued by the court can be cited.

Respondent cites to this Court's decision in *Wisniewski v. United States*, 353 U.S. 901 (1957), in an attempt to further support his argument that this Court's review would not be warranted to resolve a conflict within the Ninth Circuit. However, *Wisniewski* is inapplicable to the instant case. First, *Wisniewski* was before this Court *on certification by* the Eighth Circuit Court of Appeals, where the Eight Circuit, rather than issuing a decision in the case, sought guidance from the Supreme Court on how to resolve the issue in question. *Wisniewski*, 353 U.S. at 901. Here, the Ninth Circuit has issued a decision in Petitioner's case which is at odds with its decision in *Miranda Alvarado, supra*. Such conflict is one of the bases on which Petitioner seeks review from this Court. Thus, Petitioner's scenario is entirely different

from that in *Wisniewski*, where the court of appeals never issued a decision in the case. Further, the instant case is not only about conflicts *within* a circuit court of appeals, but is also about conflicts *among* circuit courts of appeal, as discussed in more detail below. Thus, Respondent's reliance on *Wisniewski* is misplaced.

4. Respondent argues that "Petitioner does not contend there is any difference in the legal standards applied by the circuits" in applying the continuum of conduct test set forth in *Fedorenko v. United States*, 449 U.S. 490 (1981)[1] but rather, simply cites a number of circuit decisions which naturally reach different bottom-line results to disparate factual situations. Opp. 10-11.

While Petitioner does not dispute that the decisions cited in his petition deal with varying sets of facts, contrary to Respondent's assertion, Petitioner is, in fact, arguing that the circuits are interpreting *Fedorenko* differently in issuing such decisions and,

---

[1] In determining whether the persecutor bar applies, individual accountability must be established. *Miranda Alvarado*, 449 F.3d at 926. To determine personal culpability, the Court must evaluate the applicant's actions against the continuum of conduct between "[a]n individual who did no more than cut the hair of female inmates before they were executed" and a guard who admitted to shooting at escaping inmates. *Id.* at 925-26 (quoting *Fedorenko v. United States*, 449 U.S. at 512 n.34). In determining where one's actions lie on this continuum, the adjudicator must "examin[e] the degree of relation his acts had to the persecution." *Id.*

therefore, applying different legal standards to the persecution of others bar.

In interpreting the *Fedorenko* continuum, the Ninth Circuit concluded in *Miranda Alvarado* that the petitioner, who interpreted during the interrogation and torture of Shining Path members, assisted in the persecution of others. *Miranda Alvarado*, 449 F.3d at 929-930. In assessing where the petitioner's actions fell on the *Fedorenko* continuum, the Court concluded that he had performed "an integral role in facilitating the persecution." *Id.* at 928. The Court found his assistance to be material because "[w]ithout the translation, there would have been no reason for the torture to occur as it did, as its point was to elicit information." *Id.* Because his acts as an interpreter furthered the persecution, the Court found that he had assisted in the persecution of others. *Id.* at 929. Significantly, the Court held that Miranda Alvarado's case was "perhaps at the margin of culpability required under the statute." *Id.*

As *Miranda Alvarado* stands at the margin of culpability, the present case falls squarely outside, as Petitioner's actions were not integral to or in furtherance of persecution. Petitioner's argument therefore remains that when looking at the *Fedorenko* continuum test, its application to varying sets of facts, and the disparate outcomes among the circuit courts, the test is *not* applied consistently.

To highlight the circuit courts' inconsistent application of the *Fedorenko* continuum test, the

outcomes in *Doe v. Gonzalez*, 484 F.3d 445 (7th Cir. 2007) and *Hernandez v. Rio*, 258 F.3d 806 (8th Cir. 2001), when compared to the outcome in Petitioner's case, are particularly illustrative. In *Doe*, the Seventh Circuit found that "the question of whether Doe 'assisted' or otherwise 'participated' in the persecution of the Jesuits who were killed is a close question." *Doe*, 484 F.3d at 448. In that case, Doe was a former lieutenant in El Salvador's army who, in 1989, expressed misgivings but complied with an order to accompany the Atlacatl Battalion in its mission to kill a Jesuit university president and who, after the mission resulted in the murder of six Jesuits, returned to the base and assisted in destroying log books identifying the soldiers who had participated in the raid. *See id.* at 446, 448.

Although the facts clearly demonstrate that Doe accompanied the Atlacatl Battalion with the specific purpose of killing the Jesuit university president and then later destroyed evidence of the killings, the Court found that Doe's mere presence did not seem like assistance in the persecution. *Id.* at 446, 448. To support its conclusion, the Court, citing to the *Fedorenko* continuum test, stated,

> Doe's case is closer to that of "an individual who did no more than cut the hair of female inmates before they were executed," which the Supreme Court said in *Fedorenko* "cannot be found to have assisted in the persecution of civilians," 449 U.S. at 514 n. 34, 101 S.Ct. 737. Or to that of the petitioner in *Hernandez*

> *v. Reno*, 258 F.3d 806 (8th Cir.2001), who, forced to be a member of a firing squad, fired to one side of the target, and was held not to have assisted in persecution.

*Doe*, 484 F.3d at 448.

The Eighth Circuit Court of Appeal's decision in *Hernandez* further illustrates the circuits' inconsistent approach in interpreting the *Fedorenko* continuum of conduct test and demonstrates the difficulty decision makers have in applying the test. In contrast to the instant case, in *Hernandez*, the Eighth Circuit reversed the Board's determination that an alien's behavior (where the alien followed orders to remove Guatemalan villagers from their homes, herded them to the town center, and participated in a firing squad by firing to the side of those who were identified as informants and were ultimately killed) was "'adequate to indicate' that he had assisted in persecution." *Hernandez*, 258 F.3d 806, 809, 814-815.

Thus, the application of the *Fedorenko* continuum test by both the Seventh Circuit in *Doe* and the Eighth Circuit in *Hernandez* is in stark contrast to the Ninth Circuit's application of the test in the instant case, where Petitioner's primary duties with the Guatemalan police involved typing reports and, for a short time, before knowing of the torture detainees suffered, making arrests. Petitioner's comparison of the above cited cases to that of his own is not a simple gesture of citing cases with different

facts and different outcomes. Rather, the analysis of the facts in the above mentioned cases, as well as the other cited cases in the petition, presents a question of whether the circuits are applying the legal standard – the continuum of conduct test – consistently.

5. Respondent argues that because Petitioner failed to argue in his merits brief that the Ninth Circuit lacked jurisdiction over the petition for review due to the agency's failure to issue a removal order, this Court should not address it in the first instance. Opp. 11. However, this Court would not be addressing the issue in the first instance, as Petitioner did raise this argument in his petition for rehearing before the Ninth Circuit. Further, Respondent's argument is without merit. Despite the parties' failure to raise this argument in their briefing on the petition for review, the issue of jurisdiction is properly before the Court because issues of subject matter jurisdiction may never be waived. *See Olivera-Garcia v. INS*, 328 F.3d 1083, 1086 (9th Cir. 2003).

In further claiming that Petitioner's jurisdiction argument fails, Respondent contends that there is, in fact, a final order of removal in the case. Opp. 11. Respondent supports this assertion by relying on *Lolong v. Gonzales*, 484 F.3d 1173 (9th Cir. 2007).

However, Petitioner's case is distinguishable from the Ninth Circuit's *en banc* decision in *Lolong* and, therefore, the decision in that case is not controlling here. In *Lolong*, the Court found that it had jurisdiction to consider the petition for review.

*Lolong*, 484 F.3d at 1178. In that case, Lolong conceded removability before the IJ and, as a result, the IJ held that Lolong was removable as charged. *Id.* at 1174. However, the IJ *granted* Lolong's application for asylum and, therefore, did not order Lolong removed. *Id.* The government thereafter appealed the IJ's grant of asylum, and the BIA granted the appeal, reversed the decision of the IJ, and granted Lolong's application for voluntary departure. *Id.* The court concluded that, although the IJ did not specifically order the petitioner removed, it nevertheless had jurisdiction over the petition for review. It found that where the Board overturns an IJ's grant of relief, the Board is not ordering removal in the first instance; rather it is simply reinstating the order of removal that has already been entered by the IJ and that would have taken effect but for the IJ's subsequent cancellation of removal. *Id.* at 1177.

While, as Respondent points out, in Petitioner's case the IJ designated Guatemala as the country of removal and found that Petitioner's removability had been established by clear and convincing evidence (Opp. 11), Petitioner's case is distinguishable from the facts in *Lolong*. Whereas the Board in *Lolong* expressly reinstated the IJ's prior finding of removability and thereafter overturned the IJ's decision granting petitioner's application for relief, the Board in the present case only affirmed the IJ's order denying relief. *Lolong*, 484 F.3d at 1177; Pet. App. 5. However, despite the IJ's decision denying all applications for relief, she failed to enter an order of

removal. Pet. App. 18. Thus, unlike in *Lolong*, the Board's decision in the present case, which simply affirmed without opinion the IJ's order, is insufficient to remedy the IJ's error in failing to enter an order of removal after denying Petitioner's applications.

Accordingly, in this case, the Ninth Circuit lacked jurisdiction to hear the merits of Petitioner's claim because the agency never issued an order of removal. Therefore, the Ninth Circuit erred in denying the petition for rehearing, and should have vacated its prior decision and remanded Petitioner's case to the agency for further proceedings. Thus, Petitioner respectfully requests that this Court grant certiorari in Petitioner's case and reverse the decision of the Ninth Circuit.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ILYCE SHUGALL
*Counsel of Record*
MARC VAN DER HOUT
LAURA KENT-MONNING
VAN DER HOUT, BRIGAGLIANO &
NIGHTINGALE, LLP
180 Sutter Street, Fifth Floor
San Francisco, CA 94104
(415) 981-3000
ishu@vblaw.com

June 29, 2010